83 - 1797

No._____

In The

Supreme Court of the United States

October Term, 1983

JACK GRAHAM,

Petitioner,

vs.

COLORADO,

Respondent.

Appeal from the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTION PRESENTED

Whether the prosecution's failure to comply with the discovery requirements of Rule 16 of the Colorado Rules of Criminal Procedure (C.R.Cr.P.), resulted in an unjustifiable witholding from the defense of:

(a) statements taken from a prosecution witness and introduced at trial against defendant,

(b) oral statements, or the substance of same, (and at least one written report) of expert witnesses endorsed and not called by the prosecution at trial, which, together with undisclosed critical observations and potentially exculpatory testimony of such experts, could have tended to either negate the guilt of the defendant or alerted his counsel to the inculpatory nature of same requiring the utilization of independent expert testimony for the defense,

which further resulted in a denial to defendant of his constitutional rights to a fair and speedy trial, effective assistance of counsel, due process of law, and the right to both confront withnesses against him and compel the production of witnesses in his favor, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

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JACK GRAHAM,

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Appeal from the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

Jack Graham, the Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Colorado Court of Appeals entered in the above-entitled cause on October 13, 1983.

OPINIONS BELOW

This cause was decided by a panel of the Colorado Court of Appeals on October 13, 1983, in an opinion which has been designated for routine publication. The opinion is reproduced as Appendix A hereto. A Petition for Rehearing was denied on December 19, 1983. A Petition for Writ of Certiorari was denied by the Colorado Supreme Court on March 26, 1984. The Mandate of the Colorado Court of Appeals issued on March 29, 1984, and has been stayed by the trial court until April 30, 1984, or alternatively, upon the timely filing of the within Petition for Writ of Certiorari, until the disposition of same by the United States Supreme Court.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on October 13, 1983, and a Petition for Writ of Certiorari was denied by the Colorado Supreme Court on March 26, 1984.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (2) and (3).

QUESTION PRESENTED

Whether the prosecution's failure to comply with the discovery requirements of Rule 16 of the Colorado Rules of Criminal Procedure (C.R.Cr.P.), resulted in an unjustifiable withholding from the defense of:

(i) statements taken from a prosection witness and introduced at trial against defendant,

(ii) oral statements, or the substance of same, (and at least one written report) of expert witnesses endorsed and not called by the prosecution at trial, which, together with undisclosed critical observations and potentially exculpatory testimony of such experts, could have tended to either negate the guilt of the defendant or alerted his counsel to the inculpatory nature of same requiring the utilization of independent expert testimony for the defense,

which further resulted in a denial to defendant of his constitutional rights to a fair and speedy trial, effective assistance of counsel, due process of law, and the right to both confront witnesses against him and compel the production of witnesses in his favor, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Constitution of the United States, Fourteenth Amendment

SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner was convicted by a jury of First Degree Sexual Assault, Menacing and Third Degree Assault. He was sentenced to concurrent terms of incarceration of six (6) years, two (2) years, and two (2) years, respectively.

During the trial of the within action, and at a hearing on his Motion for New Trial, Petitioner objected and complained of the prejudice resulting to him by the prosecution's failure to provide him, despite a timely request

made in accordance with the applicable state statutory discovery rule, with the written report of the results of a test performed by an expert witness chosen by the People, which results were negative, and thus, contradictory to the testimony of the victim, and exculpatory to petitioner. Petitioner further complained of the failure of the prosecution or the expert witness to advise him, prior to trial, of the substance of the expert's opinion concerning the negative test results.

The prosecution does not dispute that Petitioner was not provided with the complained of written report of their expert who tested a towel for urine with negative results, or the complete substance of the testimony of their expert witness who had examined the victim after the alleged sexual assault.

Similarly, the prosecution does not dispute that no medical or scientific corroboration of the victim's allegations was presented during the trial. Instead, their position is that such corroborative evidence is unessential to support a conviction for sexual assault, that they are not obligated to relay the substance of their expert's testimony, or supply written test findings absent a court order, nothwithstanding a defense request for same filed with the court, and that no prejudice occurred by their failure to provide Petitioner with said information and results, particularly in light of Petitioner's failure to move for a continuance upon learning of the existence of the written report and the expert's anticipated testimony concerning same on the eve or first day of trial.

Petitioner appealed his judgment of conviction to the Colorado Court of Appeals, alleging, among other errors,

that the failure to comply with statutorily mandated disclosure requirements, when coupled with the exculpatory nature of the non-communicated test results and substance of the expert's testimony concerning same, violated not only state statutes and rules, but constitutional guarantees and case law of the United States Supreme Court and the Tenth Circuit Court of Appeals.

The trial court found that notwithstanding the negative results of the scientific tests performed (including those submitted to Petitioner and those withheld from him), and the numerous inconsistencies in the victim's testimony, that there was sufficient evidence from which a jury could find that Petitioner had committed the crime of sexual assault, and that the failure of the people to comply with discovery rules and regulations did not deprive him of a fair trial or result in undue prejudice.

The trial court further found that Petitioner's failure to request a continuance, without reference to his right to a speedy trial, upon learning of the people's noncompliance with discovery requirements, deprived him of his right to complain of same upon appeal.

Subsequent to the denial of his Petition for Rehearing in the Colorado Court of Appeals, Petitioner filed a Petition for Writ of Certiorari in the Colorado Supreme Court, which Petition was denied without comment on March 26, 1984. State statutes and rules in Colorado have no provision for, or requirement of, filing a Motion for Rehearing of a denial of a Petition for Writ of Certiorari by the Colorado Supreme Court.

The trial court has granted Petitioner a stay of the mandate herein pending either his timely filing of the

within Petition, or April 30, 1984, should he not have filed same by such date.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the Writ in order to determine whether Petitioner's conviction and sentence violate his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and case law of this Honorable Court, particularly *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), as well as case law of the Tenth Circuit, particularly *United States v. Jackson,* 579 F.2d 553 (10th Cir. 1978).

In support of this Petition, Petitioner specifically avers the following:

The Colorado Court of Appeals has misapprehended the requirements and obligations imposed upon the prosecutor by Rule 16 of the Colorado Rules of Criminal Procedure, as well as the facts pertinent to defendant's claim that non-compliance with Rule 16 deprived him of exculpatory material and his constitutional right to a fair trial.

The record in this case does not support the finding by the Court of Appeals that the failure of the prosecution to comply with the requirements of Rule 16 was solely "technical" and therefore did not constitute reversible error.

The failure of the prosecution to provide, after formal request, the written report of the people's expert witness indicating the lack of the presence of urine on a towel which the victim testified defendant had used to wipe her face after urinating thereon, deprived defendant of ex-

culpatory evidence to present to the jury, which evidence could have affected the outcome of the trial, especially when considered in conjunction with the testimony regarding the results of other scientific tests, similarly adducing a lack of physical evidence to establish or corroborate a sexual assault. *United States v. Agurs, supra; United States v. Jackson, supra.*

The failure of the prosecution to provide the substance of the oral testimony of their expert witness concerning the absence of urine on the towel alleged by the victim to have been used to remove same from her face, or the anticipated testimony of another expert witness concerning her opinion of the results of physical testing of the alleged victim, directly resulted in prejudice to defendant by misleading him and his counsel. By encouraging them to rely upon the lack of inculpatory evidence as evidenced by the negative results of scientific tests, and failing to advise them of the substance of the testimony of the testing experts which would reduce or eliminate the exculpatory nature of the test results, defendant justifiably and logically failed to perceive or incur the need or expense of other experts to confirm the exculpatory nature of the testimony and test results.

Contrary to the findings and conclusions contained in the opinion of the Court of Appeals, defendant submits that:

(1) A defendant is not obligated to request a court order for discovery materials contained within Rule 16; the obligation is upon the prosecutor to provide same.

(2) A defendant should not be forced or placed in the position of exercising one constitutional right (due process of law) and the fundamental right to be apprised of the nature of the charges and evidence supporting

same (i.e. the right to a fair trial), at the expense or forfeiture of another constitutional right, to wit: that of a speedy trial. It should not be deemed incumbent upon a defendant to request a continuance of his trial due to prosecutorial failure to comply with discovery requirements when such failure could result in a different jury verdict, and impair or dissipate his right to a fair and speedy trial.

(3) Defendant's request for discovery was not "general" in nature, nor did it fail to assert and establish that the information requested therein was either exculpatory, impeaching, or materially prejudicial in nature.

(4) Defendant did object to the afore-referenced discovery violations in his motion for judgment of acquittal and motion for new trial.

(5) The Court clearly erroneously failed to apply the judicial proclamation contained in *Brady v. Maryland*, 373 U.S. 82 (1963) that a pretrial request for specific evidence renders such requested evidence "material" in that if suppressed, the outcome of the trial would be affected, and further, that the failure of the prosecution to provide discovery, when legally obligated to disclose same, warrants the reversal of a conviction regardless of whether a general request, or no request had been made therefor, in that such failure deprives a defendant of his constitutional right to a fair trial.

(6) The conduct of the prosecution herein, in withholding from defendant reports, critical observations and anticipated testimony of experts and other witnesses clearly violates Rule 16, C.R.Cr.P. Further, such conduct evinces a conscious (or at least an intentional) act calculated to mislead defendant, which resulted in prejudice and the denial of his right to a fair trial as guaranteed by

the United States and Colorado Constitutions. In addition, even if such conduct was negligent and non-intentional, a defendant is still entitled to suppression, production, or appropriate sanctions, by virtue of the Due Process clause of the United States and Colorado Constitutions, including all sections hereinabove set forth.

(7) As stated in *People v. Thatcher,* 638 P.2d 760 (Colo. 1981), where the defense has made a specific request for certain information in the possession or control of the prosecution, discovery of that information is constitutionally compelled, not only when it is exculpatory, but when it is of material importance to the defense. The Court further held therein that the use of discovery material for impeachment purposes implicates the due process rights of the defendant and is of material importance to his defense. Moreover, if the information might have affected the outcome of the trial, reversal is mandated.

(8) The trial court and the appellate courts erred in equating, and failing to distinguish between, the lack of scientific evidence to corroborate a victim's testimony, and the negative (and withheld) results of scientific testing and evidence which failed to substantiate her testimony, and could have diminished her credibility and the weight accorded her testimony in the opinion of the jury, and which was either exculpatory to the defendant, and/or material to the determination of his guilt or innocence, which error resulted in the inappropriate application of a legal proposition and unjustifiable affirmance of his conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

EXHIBIT "A"

COLORADO COURT OF APPEALS

No. 82CA0570

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JACK A. GRAHAM,

Defendant-Appellant.

Appeal from the District Court of El Paso County
Honorable David Parrish, Judge

DIVISION III
Opinion by JUDGE BERMAN
Kelly, J., concurs
Tursi, J., specially concurs JUDGMENT AFFIRMED

Duane Woodard, Attorney General
Charles B. Howe, Deputy Attorney General
Joel W. Cantrick, Special Assistant Attorney General
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COURT OF APPEALS
STATE OF COLORADO

Opinions filed and judgment entered on the 13th day of October, 1983

Clerk of the Court

(SEAL)

The defendant was convicted by a jury of first degree sexual assault, menacing, and third degree assault and was sentenced to concurrent terms of incarceration of six years, two years, and two years, respectively. He appeals. We affirm.

The prosecution's case-in-chief consisted primarily of testimony of the victim, then a high school senior. She testified that during the night of April 20, 1981, and continuing to 7:00 a.m. on April 21, the defendant, a former boyfriend of her mother, brutalized and sexually assaulted her in the apartment she shares with her mother. She testified that she was forced to submit to the assault and various indignities by the defendant, who, at times during the incident, choked and threatened her with a kitchen knife.

At approximately 7:00 a.m. the defendant dropped the victim off at her high school, where she reported the incident to school authorities. At the time of the incident the victim's mother was in the hospital.

At trial, the prosecution presented the testimony of the victim's mother, as well as that of the school officials to whom the victim first reported the assault, and of the investigating officers to corroborate the victim's story. Defendant presented various expert testimony, but did not himself testify.

Following his conviction, defendant moved for a new trial based on affidavits from certain jurors indicating that, during their deliberations, some of them had considered defendant's failure to testify, as well as defendant's demeanor and facial expression, and had allowed such factors to affect adversely their determination of defend-

ant's guilt. During that hearing, the court denied defendant's motion for new trial and held that, contrary to defendant's contentions, (1) the victim's testimony was not incredible as a matter of law, (2) the prosecution produced sufficient evidence from which it could be determined that defendant was guilty on the sexual assault charge beyond a reasonable doubt, (3) the testimony of the school officials and the investigating officer did not substantially prejudice defendant, and (4) any failure by the prosecution to comply with discovery requirements did not deprive defendant of a fair trial.

During the subsequent sentencing hearing, defendant objected to the court's consideration of a letter from defendant's daughter to the district attorney alleging the defendant had sexually assaulted her four years earlier.

I.

The defendant contends first that the victim's testimony was incredible as a matter of law. Defendant's position is that this, together with a lack of any scientific evidence, should have resulted in the trial court granting defendant's motion for judgment of acquittal. We disagree.

The proper standard to be used by a trial court in passing upon a motion for judgment of acquittal is whether the relevant evidence, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Brassfield,* 652 P.2d 588 (Colo. 1982); *People v. Bennett,* 183 Colo. 125, 515 P.2d 466

(1973). Here, in light of the testimony of the victim and her mother, that standard was met.

The testimony of a witness may not be ruled incredible as a matter of law unless it is totally unbelievable. *People v. Brassfield, supra; People v. Gennings,* 196 Colo. 208, 583 P.2d 908 (1978). Where the victim of a traumatic event recounts details of that event differently on various occasions, it is not necessarily an indication that the victim's story is incredible. The variance in sequence and detail may be due to the trauma of the event or to a lapse in time. Any inconsistencies within a witness' testimony and contradictions between witnesses on a particular fact affect only the witnesses' credibility and must be resolved by the jury. *People v. Brassfield, supra; People v. Griffith,* 197 Colo. 544, 595 P.2d 231 (1979); *Roybal v. People,* 177 Colo. 144, 493 P.2d 9 (1972).

Scientific evidence to support the victim's testimony is not a legal prerequisite to a jury's finding that the defendant is guilty of unlawful sexual behavior. *See People v. Fierro,* 199 Colo. 215, 606 P.2d 1291 (1980).

II.

Defendant's second argument is that the trial court erred in admitting testimony of the two school authorities and the investigating officer, in violation of CRE 801(d) (1) (B). CRE 801(d) (1) (B) states that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication of improper influence or motive.

Here, the trial court found that the victim's motive had been brought into question by the defendant's impeachment of the victim using her prior inconsistent statements during cross-examination. The defendant's theory was that the victim had fabricated the entire assault story because she disliked him. The court also found that, although the victim's statements concerning the incident which were elicited through the testimony of the school authorities and investigating officer contained some inconsistencies, those statements still were primarily consistent with the statement being impeached by the defendant. Therefore, it concluded that the admission of such testimony did not violate CRE 801. We agree with this assessment of the admissibility of the testimony.

Nor do we find that the probative value of the testimony was substantially outweighed by unfair prejudice. Evidence that a sexual assault victim made a prompt complaint has long been permitted as conduct corroborative of, and consistent with, a victim's testimony. *People v. Fierro, supra; People v. Gallegos,* 644 P.2d 920 (Colo. 1982); *Padilla v. People,* 156 Colo. 186, 397 P.2d 741 (1964).

The trial court did state during the prosecution's offer of proof regarding the investigating officer's testimony that it "might" have made a mistake in admitting the testimony of the school authorities. However, this statement was superseded by the court's later ruling that those witnesses' statements, although not what the court was expecting, were still properly admissible under CRE 801(d) (1) (B).

The granting of a motion for a mistrial is within the discretion of the trial court and the prejudice asserted

must be substantial. *Hamrick v. People,* 624 P.2d 1320 (Colo. 1981). The trial court did not err in denying defendant's motion for mistrial because the testimony of the school authorities and the investigating officer was properly admissible as non-hearsay under CRE 801.

III.

The defendant argues that the prosecution violated Crim. P. 16 by failing to inform him that the victim's mother would testify that she was missing her favorite kitchen knife. In addition, the defendant alleges the prosecution failed to give him a copy of a report concerning the results of urine tests on a blue towel, which allegedly was used to wipe the victim's face after defendant had urinated on her face, and to disclose the substance of a physician's testimony concerning her physical examination of the victim after the sexual assault.

As to the testimony of the victim's mother concerning her missing kitchen knife, we find no reversible discovery violations for two reasons. First, this facet of the mother's testimony was learned by the prosecution in an oral interview, and there is no duty of the prosecution to reduce oral interviews with witnesses to writing and to provide the same to defense counsel. *People v. Garcia,* 627 P.2d 255 (Colo. App. 1980), *cert. denied* (1981). Second, a conviction will not be reversed because of non-compliance with discovery rules absent a cogent demonstration of prejudice to the defendant, *People v. Steed,* 189 Colo. 212, 540 P.2d 323 (1975), and no such demonstration was made here.

The defendant did not object at trial to the testimony concerning the kitchen knife, nor did he request a contin-

uance or make any suggestion to the trial court that he needed additional time to prepare an adequate defense. Failure to contemporaneously object to the admission of evidence precludes appellate review of the matter, unless the alleged error is so serious as to prejudice basic rights of the defendant. *People v. Taggart,* 621 P.2d 1375 (Colo. 1981). In the case at bar, we find no such prejudice to the defendant. Rather, any claim by the defendant at the appellate level that he was unfairly surprised and unable to prepare adequately for cross-examination is thoroughly discredited by his failure to move for a continuance at the trial level. *See United States v. McPartlin,* 595 F.2d 1321 (7th Cir. 1979) (failure of defendants to renew request for a continuance thoroughly discredits their assertion that they were prejudiced by the timing of disclosure).

Regarding the report of the results of the urine test on the towel, we find no Crim. P. 16 violation which would justify reversing defendant's conviction. Defense counsel did not request an order from the trial court to compel production of the report, nor did he request a continuance. In addition, the defendant admits that he knew the results of the test several months before the trial started. Under such circumstances, technical non-compliance with Crim. P. 16 does not constitute reversible error. *People v. Steed, supra.* Evidence is generally not improperly withheld if the defense has knowledge of it. *State v. Jarrell,* 608 P.2d 218 (Utah 1980). *See also People v. Zallar,* 191 Colo. 492, 553 P.2d 756 (1976).

The third discovery violation alleged by defendant on appeal is that the district attorney withheld information that the physician who examined the victim believed that the marks on the victim's neck were consistent with her

having been choked. The district attorney learned of the physician's opinion in an oral interview. Since it appears that this interview was not recorded in any manner, the district attorney was under no duty to furnish the doctor's opinions to the defendant. *People v. Garcia, supra.* In addition, the defendant admitted he learned of the physician's opinion concerning the choke marks before trial and did not request a continuance. Hence, once again, we find no prejudice to the defedant. *United States v. McPartlin, supra; State v. Jarrell, supra.*

We hold that the defendant was not denied his constitutional right to a fair trial under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant's discovery motion was a general request for information, and he made no showing that any of the information in issue was exculpatory or impeaching. Hence, the defendant has failed to show materiality as required by *Brady* and has failed to show prejudice as required by *People v. Steed, supra.*

IV.

Defendant also asserts reversible error occurred because, in arriving at a guilty verdict, some jurors considered the facial expressions and demeanor of the defendant and the defendant's failure to testify. Defendant seeks to impeach the jury verdict by affidavits to this effect.

A jury verdict may not be impeached by affidavit except in very limited circumstances involving external influence improperly bearing upon the jury. CRE 606(b); *Santilli v. Pueblo,* 184 Colo. 432, 521 P.2d 170 (1974). Impeachment of a verdict on grounds which delve into the mental processes of jury deliberation is not permitted.

Santilli v. Pueblo, supra; Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (1951).

Here, we find no indication of jury tampering, coercion, bribery, or gross misconduct so as to allow impeachment of the verdict for misconduct. Nor do we find any extrinsic influence improperly brought to bear on the jury. *People v. Constant,* 645 P.2d 843 (Colo. 1982), cited by defendant, is inapposite. Hence, defendant's attack upon the jury verdict is unavailing.

V.

Finally, defendant argues that the trial court abused its discretion in sentencing the defendant after improperly considering a letter sent to the district attorney from the defendant's daughter. We find no error in the trial court's sentence.

JUDGE TURSI specially concurring.

I specially concur because of concern with the possible interpretations of Part III of our opinion.

I agree that under the facts of this case, defendant has failed to show prejudice because of the People's failure to disclose the evidence discussed in Part III. *See People v. Steed,* 189 Colo. 212, 540 P.2d 323 (1975). But, what concerns me is that this opinion may be read to create an unqualified rule that there is never a duty on the People to reduce oral interviews with witnesses to writing, and thus, no duty to provide the content of the interview to defense counsel. *See People v. Garcia,* 627 P.2d 255 (Colo. App. 1980).

Although the statement of this rule accurately reflects the prosecution's obligation pursuant to Crim. P. 16, it

cannot be used to relieve the prosecutor from the duty to disclose information which may be exculpatory or inculpatory to the defendant by the device of not reducing oral interviews to writing. *See United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *See also United States v. Jackson,* 579 F.2d 553 (10th Cir. 1978)

The defendant was sentenced within the presumptive range for the offenses for which he was convicted. Section 18-1-105, C.R.S. 1973 (1982 Cum. Supp.). In determining an appropriate sentence, the trial court may conduct a broad inquiry, largely unlimited as to the kinds of information it may consider, and it has wide discretion in determining what sentence is appropriate. Moreover, sentences imposed within statutory limits are generally not subject to review. *U.S. v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also People v. Lowery,* 642 P.2d 515 (Colo. 1982).

In *Tucker,* the court found that the sentence of the defendant was based upon "misinformation of a constitutional magnitude." In contrast, in the instant case, there is no proof that the information upon which defendant was sentenced was in any way materially inaccurate. The defendant merely raises bald inquiries, unsupported by any proof.

Contrary to defense counsel's allegations, the record as a whole reveals that the sentence imposed rested on communications that were neither "secret" nor "ex parte." Rather, defendant's attorney admitted having seen a copy of the letter in question and having tried to contact defendant's daughter. Moreover, there is no evidence in the record which suggests that defendant's sentence was imposed on the basis of that letter.

The defendant argues that the trial court erred in denying probation and sentencing him to a term of incarceration within the presumptive range. However, the denial of probation is not subject to appellate review. Section 16-11-101(1)(a), C.R.S. 1973 (1978 Repl. Vol. 8). *People v. Godwin,* — P.2d — (Colo. App. No. 82CA0946, September 29, 1983).

Judgment affirmed.

JUDGE KELLY concurs.

JUDGE TURSI specially concurs.

APPENDIX B

IN THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 82CA0570

THE PEOPLE,

Plaintiff-Appellee,

v.

JACK A. GRAHAM,

Defendant-Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the appellant herein, said Petition is hereby denied. Unless otherwise ordered, mandate will issue 12/15/83.

BY THE COURT,
DATED: 12/8/83

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

(SEAL)
Copies mailed to: Counsel of Record on 12-8-83 by C.K.G.

APPENDIX C

SUPREME COURT, STATE OF COLORADO

Case No. 84SC36

CERTIORARI TO THE COLORADO COURT OF APPEALS; No. 82CA0570

ORDER OF COURT

JACK GRAHAM,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certeriorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MARCH 26, 1984.
JUSTICE LOHR does not participate.

cc: Mac V. Danford, Clerk
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END OF DOCKET